IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. .....

RICHARD A. KENT, Petitioner,

versus

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Richard A. Kent, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit filed July 26, 1946, affirming a final decree in the District Court for the Eastern District of Louisiana, condemning as for-

feited to the United States a truck and about fifty-two cases of distilled spirits. (R. 140)

JURISDICTION

Jurisdiction is based on Section 240(a) of the Judicial Code, as amended, 28 U.S. Code 347. Rehearing was denied August 28, 1946.

OPINIONS BELOW

The opinion of the District Court is reported in 62 F. Supp. 749. It is printed at pages 132 to 138 of the record. The opinion of the Circuit Court of Appeals is not reported. It is printed at pages 150 to 152 and 157 to 159 of the record.

SUMMARY STATEMENT

This is a proceeding brought to adjudicate as forfeited to the United States certain property consisting of a truck and liquors. The libel of information, as amended, alleges that petitioner Kent was in possession of the property with intent to use the same in violation of the internal-revenue laws, (R. 20-24), and claims forfeiture under Section 3116, Title 26 Internal Revenue Code which provides a forfeiture of property possessed with intent to use in violation of the internal-revenue laws. The issue resolved itself to whether petitioner Kent was, at the time of seizure of the liquors, transporting the same to a certain place where he was duly registered as a retail liquor dealer under the internal-revenue laws or to be sold otherwise. As to this, the District Court, sitting without a jury, said:

"In other words, if Kent was transporting the liquor in question to the Spot for retail purposes, he was not violating the law. If however he intended to sell the liquor anywhere else in Mississippi or anywhere at all in Louisiana, either wholesale or retail, he was disregarding the provisions of 26 USCA 3116, which reads in part as follows:

" 'It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part (relating to industrial alcohol), or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property . . .'

"The question of Kent's intent, therefore, is crucial in the instant case."

The District Court considered evidence of long prior transactions to the date of seizure in which petitioner was involved, and which the court considered as violations of the internal-revenue laws, and also purchases of liquor subsequent to the date of seizure. There was no evidence offered of any violation of the internal-revenue laws at the time of the seizure of the truck and liquors, and, as the Circuit Court of Appeals on appeal said:

"The question at issue is not whether Kent had committed a crime by transporting the liquors by means of the truck, *for he had not*, but whether he was using the truck and liquors with the intention of committing a crime in the near future. Since no crime had been consummated. * * *" (R. 158) (Emphasis supplied).

And, as to Kent's intention for the disposition of the liquors, the District Court said:

> "He more than any other human being in the world knows what plans for the disposition of the liquor he was harboring on June 2, 1944, when the liquor was seized. Yet Kent has seen fit to remain silent throughout these proceedings, although he has intimate knowledge regarding the controverted issue of intent. The Court is not willing to ignore this significant silence."

The District Court concluded that Kent intended to sell the liquors at a place or places other than the place he was duly registered under the internal-revenue laws, (R. 139), and adjudged the truck and liquors forfeited. (R. 140).

The District Court inferred such unlawful intent because Kent did not testify. And as to this the Circuit Court of Appeals said:

> "It was not error to consider Kent's failure to testify as a circumstance indicative of the truth. * * * The provision of the Fifth Amendment: 'nor shall be compelled in any criminal case to be a witness against himself' has no application. This is not a criminal case but a civil case, and no one seeks to compel Kent to testify. He has voluntarily appeared in the case as claimant. He voluntarily does not tell what he knows. His silence may well count against him, as against any other civil litigant. So also the Statute, 28 U.S.C.A. § 632, providing that the 'person so charged' shall be a competent witness at his own request but not otherwise; 'and his failure to

> make such request shall not create any presumption against him,' is without application, for it is limited to 'the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors.' This is not such a trial. Kent is not here charged with any crime or offense. This property is alleged to be forfeited under 26 U.S.C.A. § 3116, because 'intended for use in violating the provisions . . . of the internal revenue laws'." (R. 152)

Upon motion for rehearing, the Circuit Court of Appeals said that the question urged by petitioner that under the decision of this Court in *Boyd v. United States, 116 U.S. 616*, and cases following it, require that this proceeding for forfeiture, for the purpose of the questions raised, that is, the application of the Fifth Amendment, should be treated as a criminal case, was interesting, but said they did not think so. The court gave as reason for its conclusion that the forfeiture herein was not for a committed offense, but for intended offenses, and the statute did not provide for fine and imprisonment against petitioner in addition to the forfeiture of his property. The court held the proceeding herein preventive and remedial, rather than punitive or criminal in nature, comparing the instant case with *Helvering v. Mitchell 303 U.S. 391.*

QUESTIONS RAISED:

1. Is not *Boyd v. United States, supra*, applicable to any proceeding for forfeiture of property?

2. Is not a proceeding for forfeiture of property for the act of the owner of property in possessing property for

intended unlawful use of a punitive and criminal nature, instead of a preventive or remedial nature, making applicable thereto that portion of the Fifth Amendment that no person shall be impelled to testify against himself?

3. If the failure of a party to testify in a proceeding for forfeiture of his property, is to be construed as an unfavorable inference against him, is not his privilege under the Fifth Amendment prohibiting a person being compelled to testify against himself, annulled and totally destroyed?

4. Is not the statute 28 U.S.C.A. 632, providing that the "person so charged" shall be a competent witness at his own request but not otherwise; "and his failure to make such request shall not create any presumption against him," applicable to a proceeding for forfeiture of his property based upon breaches of the law allegedly committed by him, to the same effect, as in a proceeding where he is subject to a fine or imprisonment?

REASONS FOR GRANTING THE WRIT

1. The court below has unduly restricted the decision of this court in the *Boyd* case, *supra*, and cases following it, and contrary to the language of this court in its opinion therein, particularly the following:

> "A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, *or to subject his property to forfeiture.* Queen v. Newell, Parker, 269; 1 Greenl. Ev. §§ 451-453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nomi-

nal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." (Emphasis supplied)

And in conflict with the language of this court in *Counselman v. Hitchcock, 142 U. S. 547, 563, 564,* wherein this court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him *or subject him to fines, penalties, or forfeitures.* Tex v. Slaney 5 Car. & P. 213; Cates v. Hardacre, 3 Taunt, 424; Maloney v. Bartley, 3 Campb. 210; 1 Stark. Ev. 71, 191; Sir John Freind's Case, 13 How. St. Tr. 16; Earl of Macclesfield's Case, 16 How. St. Tr. 767; 1 Greenl. Ev. § 451; 1 Burr's Trial, 244; Whart. Crim. Ev. (9th Ed.) § 463; Southard v. Rexford, 6 Cow. 255; People v. Mather, 4 Wend. 229; Lister v. Boker, 6 Blackf. 439." (pp. 563, 564) (Emphasis supplied)

And in holding the proceeding herein not criminal in nature, the court below is in conflict with this court in the *Boyd* case, *supra,* and in *Lees v. United States, 150 U.S. 476,* which latter case involved a proceeding to recover a penalty, and as to the nature of such a proceeding, this court said:

"This, though an action civil in form, is unquestionably criminal in its nature, and in such

> a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. United States, 116 U.S. 616 (29:746). The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

And the court below is in conflict with the holding of the Ninth Circuit following the *Boyd* and *Lees* cases, *supra*, in *P. E. Harris & Co. v. O'Malley, 2 F. (2d) 810*, which court therein held that forfeiture proceedings while civil in form, are criminal in nature, and therein said that the "requirement that proceedings in forfeiture shall be *in rem* under rules in admiralty effects the form but not the character of the proceeding."

And the court below in holding that that portion of the Fifth Amendment that no person can be compelled to be a witness against himself, is not applicable to the forfeiture proceeding herein, is in conflict with the Ninth Circuit in *P. E. Harris & Co. v. O'Malley, supra*, and the cases following the *Boyd* and *Lees* cases, *supra*, which cases consider the question settled that proceedings for forfeiture are so far criminal as to come within that portion of the Amendment. That as said in *United States v. Eight Packages of Drugs (D.C.S.D. Ohio), 5 F. (2d) 971, 976:*

> "* * * there is a long list of cases, beginning with Boyd v. U.S., 116 U.S. 616, 634, S. Ct. 524, 29 L.Ed. 746, which hold that proceedings in seizure and forfeiture are so far criminal as to come

> within the meaning of the Fourth Amendment. Lees v. U.S., 150 U.S. 480, 14 S.Ct. 163, 37 L.Ed. 1150; Stone v. U.S., 167 U.S. 178, 187, 17 S.Ct. 778, 42 L.Ed. 127; State v. Chicago, B. & Q. R. Co. (C.C.) 37 F. 497, 500, 3 L.R.A. 554; State v. Day Land, etc. (C.C.) 41 F. 518; Snyder v. U.S. 434, 6 S.Ct. 432, 29 L.Ed. 681; Clifton v. U.S., 4 How. 242, 250, 11 L.Ed. 957."

And further said:

> "The propriety of these views has not been questioned, so far as this court, after much research, has been able to ascertain, and they are summed up by Mr. Justice Harlan in Hepner v. U.S., 213 U.S. 103, 111, 29 S.Ct. 474, 478 (53 L.Ed. 720, 27 L.R.A. (N.S.) 739, 16 Ann. Cas. 960) in this language: 'In the latter case (Boyd v. U.S.) it was adjudged that penalties and forfeitures incurred by the commission of offense against the law are of such a quasi criminal nature that they come within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution and of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.' "

See also *United States v. Fifty-eight Drums of Material, Etc. (D.C.W.D. Penn.) 38 F. (2d) 1005.*

2. The court below in comparing the case herein with *Helvering v. Mitchell, supra,* is giving an erroneous interpretation thereto, as in that case a forfeiture of property was not involved, but a remedial sanction for the benefit of the Government for reimbursement for expense incurred in investigating the fraud of the taxpayer, collectible ad-

ministratively by distraint. If that case is to be construed as including forfeiture proceedings within the class of remedial sanctions, is contrary to the language of this court in *Stone v. United States, 167 U.S. 178, 187* in differentiating a case of a civil nature from one of a criminal nature, as follows:

> "This is not a suit to recover a penalty, to impose a punishment, *or to declare a forfeiture.*" (Emphasis supplied)

If that portion of the Fifth Amendment which provides that no person can be compelled to testify against himself is applicable to a forfeiture proceeding as in the instant case, the court below in holding that it was not error of the district court drawing an unfavorable inference for the failure of petitioner to testify, destroys and totally annuls the foregoing privilege under that amendment, and is in conflict with the Circuit Court of Appeals for the Second Circuit in *Pennsylvania R. Co. v. Durkee, 2ud Cir., 147 F. 99, 102*; wherein the court said:

> "The conclusion reached was that the rule as to drawing unfavorable inferences from the failure of a party to produce evidence 'is not to be applied to those cases where the law, on grounds of public policy, has established privileges against being compelled to produce it,' and also that, '*if the failure to produce the testimony is to be construed as a circumstance against the party, his privilege would be annulled and entirely destroyed,*' Johnson v. State, 63 Miss. 316; Newcomb v. State, 37 Miss 383; Knowles v. People, 15 Mich. 408.

> "The Appellate Division of the Supreme Court of New York for the First Department has apparently reached a different conclusion in Deutschmann v. Third Ave. R. R., 87 App. Div. 503, 84 N.Y. Supp. 887. That case seems not to be in accord with the general consensus of judicial opinion, and, since the question is not one of interpretation of a state statute, but deals only with the general law of evidence, there is no reason apparent why this court should follow it." (Emphasis supplied)

3. The court below in holding that the statute 28 U.S.C.A. 632 providing that the "person so charged" shall be a competent witness at his own request but not otherwise; "and his failure to make such request shall not create any presumption against him," is without application (R. 152), is untenable, as not in conformity with the decisions of this Court in the *Boyd* and *Lees* cases, *supra*, applying that portion of the Fifth Amendment that no person shall be compelled to be a witness against himself to forfeiture proceedings as in purely criminal proceedings, as such proceedings are so far criminal in nature that such statute should be applicable.

Wherefore petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and to send to this court for its review and determination on a day certain to be named therein a full and complete transcript of the record of all proceedings in the case numbered and entitled, *Richard A. Kent Claimant-Appellant versus United States of America, Appellee, No. 11529*, and that

the decision of the said Circuit Court of Appeals in said case be reversed, and that your petitioner have such other and further relief in the premises as may be just.

RICHARD A. KENT, Petitioner.
By M. A. GRACE,
EDWIN H. GRACE,
Counsel.

CERTIFICATE

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

M. A. GRACE,
EDWIN H. GRACE,
Counsel
501 Hibernia Bldg.,
New Orleans 12, La.

New Orleans, La.,
October ___, 1946.

APPENDIX

Section 3116, Title 26, Internal Revenue Code:

> "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U.S.C. Title 18 §§ 611-633) for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws, 53 Stat. 362."

Section 632, Title 28, U.S.C.A.:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 608

RICHARD A. KENT, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals affirming the judgment of the district court (R. 149–151) and its opinion denying a petition for rehearing (R. 155–156) are reported at 157 F. 2d 1. The opinion of the district court and its findings of fact and conclusions of law appear at pages 132–140 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered July 26, 1946 (R. 151), and a petition for rehearing (R. 152–154) was denied August

28, 1946 (R. 156). The petition for a writ of certiorari was filed October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 12, 1925.

QUESTION PRESENTED

In a proceeding for the forfeiture of property alleged to have been possessed by petitioner with intent to use it in violating certain provisions of the internal revenue laws relating to liquor, the district judge stated in his opinion adjudging the forfeiture of the property that in the light of the substantial evidence adduced by the Government establishing such intent on the part of petitioner, he was not willing to ignore petitioner's failure to testify on this issue. The question is whether this was violative of the constitutional privilege against self-incrimination or of the statute (28 U. S. C. 632) providing that in the trial of a person charged with the commission of a crime, his failure to testify shall not create any presumption against him.

STATUTES INVOLVED

Section 3116 of the Internal Revenue Code (26 U. S. C. 3116) provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations pre-

scribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

The Act of March 16, 1878, c. 37, 20 Stat. 30 (28 U. S. C. 632), provides:

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And

his failure to make such request shall not create any presumption against him.

STATEMENT

This proceeding arose upon a libel, as amended,[1] filed in the District Court for the Eastern District of Louisiana to adjudicate the forfeiture of a truck and certain liquor. The libel alleged that petitioner had been in possession of this property with intent to use it in the business of a wholesale liquor dealer although he was not registered as such with the Collector of Internal Revenue (R. 21–24), and that, therefore, the property was subject to forfeiture under Section 3116 of the Internal Revenue Code, *supra*.[2]

Petitioner does not question the sufficiency of the evidence to support the decree of condemnation and forfeiture. That decree (R. 140–141)

[1] The original libel was filed August 24, 1944 (R. 2–8), and it was amended on November 6, 1944 (R. 15–17), December 18, 1944 (R. 20–24), and May 5, 1945 (R. 24–25).

[2] Count 1 of the libel also claimed forfeiture under Section 3253 of the Internal Revenue Code (26 U. S. C. 3253) predicated on the actual commission of offenses under the internal revenue laws, i. e., having engaged in the wholesale liquor business without a license (R. 5). However, at the trial and in all subsequent proceedings, the parties and the courts below proceeded on the theory, followed in the petition here, that the only issue raised by the evidence adduced related to the intended use of the property in violation of the internal revenue laws, and the issue whether actual violations had been committed was excluded. See, e. g., R. 133, 149–150, 153, 155–156, and Pet. 2, 3, 5–6.

was predicated on the findings of the trial court that although petitioner had qualified as a retail liquor dealer at a place known as "The Spot" in East Jackson, Mississippi, for the period July 1, 1943, to June 30, 1944, but not thereafter, he had not qualified as such at any other place; that he had not qualified as a wholesale liquor dealer anywhere in Louisiana or Mississippi; and that at the time of the seizure of the truck and liquor by agents of the Alcohol Tax Unit on June 2, 1944, petitioner "intended to sell the liquor to anyone in Jackson, wholesale or retail, whichever way he could get the most money for it" (R. 138–139).[3] The court therefore concluded as a matter of law that the property was intended for use in violating specified provisions of the internal revenue laws and, consequently, was subject to seizure and forfeiture (R. 139–140). In his opinion (R. 132–138) filed concurrently with his findings of fact and conclusions of law, the trial judge, after summarizing the evidence adduced by the Government establishing petitioner's intent to violate the law, made the following statement which gave rise to the issue mooted in the court below and here (R. 136–137):

[3] The opinion of the District Court also refers to evidence showing that petitioner had made wholesale sales and that he could not have disposed of the seized liquor at "The Spot," for which he had a retail license, since others were operating those premises (R. 132–135).

> Finally, it will be remembered that the seizing officers testified that Kent told them he intended to sell the liquor to anyone in Jackson, wholesale or retail, whichever way he could get the most money for it.
>
> But were the statements attributed to Kent by the three officers untrue, or were the inferences drawn from his previous illegal sales unwarranted, one man and one man alone is in the best position to make the necessary denials. That man is Kent himself. He best of all knows what he told the officers. He more than any other human being in the world knows what plans for the disposition of the liquor he was harboring on June 2, 1944, when the liquor was seized. Yet Kent has seen fit to remain silent throughout these proceedings, although he has intimate knowledge regarding the controverted issue of *intent*. The Court is not willing to ignore this significant silence.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 149–151), and a petition for rehearing, based solely on the same contentions as are presented in the petition for a writ of certiorari, was denied (R. 155–156).

ARGUMENT

The sole issue here involves the propriety of the trial judge's attitude in considering, to the extent indicated in his opinion, the fact that petitioner remained silent on the controverted issue of his

intent. There can be no doubt that if the libel proceeding was a civil proceeding, the trial judge was entitled to give consideration to petitioner's silence. *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 263–268. Petitioner urges, however, principally on the authority of *Boyd* v. *United States,* 116 U. S. 616, that the proceeding is criminal in nature, and that, therefore, the protections of the Fifth Amendment against self-incrimination and of the Act of March 16, 1878, 28 U. S. C. 632, proscribing the creation of a presumption against a silent defendant, were applicable and were abridged by the trial judge (Pet. 6–12).

In order properly to evaluate the foregoing contentions, it is necessary to analyze the terms of Section 3116 of the Internal Revenue Code, *supra,* pp. 2–3, under which the forfeiture was had. That section, in the first sentence, provides for forfeiture in two distinct classes of cases: (1) where the property is intended to be used unlawfully, and (2) where it has already been so used. In either case, since the statute provides that "no property rights shall exist in any such liquor or property," it is clear that the forfeiture is automatic upon the existence of the circumstances described. Cf. *United States* v. *Grundy and Thornburgh,* 3 Cranch 337. The forfeiture under the first branch of the statute, upon which the libel here proceeded, is designed to prevent the execution of intended unlawful activities, rather than to punish on account

of the past commission of offenses. In this respect, this part of the statute is in direct contrast with forfeiture provisions such as Section 3253 of the Internal Revenue Code, whereby the forfeiture results from accomplished unlawful activity.[4] The forfeiture here is thus not punitive but preventive and is calculated to enable the Government to seize the intended implements of crime before the unlawful and punishable activity occurs.[5] In short, while many property forfei-

[4] That section (26 U. S. C. 3253) provides as follows:

"Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States." Cf. also, e. g., Crim. Code, Section 308 (18 U. S. C. 499); Act of August 9, 1939, c. 618, § 2, 53 Stat. 1291 (49 U. S. C. 782); Act of June 6, 1924, c. 272, § 6, 43 Stat. 466 (48 U. S. C. 226); Act of July 2, 1890, c. 647, § 6, 26 Stat. 210 (15 U. S. C. 6); Act of June 17, 1930, c. 497, Tit. IV, § 460, 46 Stat. 717, as amended (19 U. S. C. 1460).

[5] Cf. Section 172 of the Criminal Code (18 U. S. C. 286), providing, *inter alia*, for forfeiture of material or apparatus "fitted or intended to be used" in the making of counterfeit government obligations.

tures are worked partially if not completely as a form of punishment in consequence of the use of such property in the execution of criminal acts, in some instances Congress has apparently felt that it is necessary and desirable, in order to prevent the commission of certain types of offenses, to allow the seizure and condemnation of criminally usable property even before an offense occurs and thereby avoid the injurious consequences of an actual violation.[6] Such a forfeiture, while it may work a loss upon the owners, cannot be said to be punitive, or a substitute for other punishment consequent upon actual criminal activity.

In the light of the foregoing analysis of the forfeiture contemplated by the first part of Section 3116, it is clear that petitioner's contentions are without merit. The libel here was purely civil in all its aspects, not punitive or quasi-criminal, and therefore the privilege against self-incrimination and the corollary statutory privilege against the creation of a presumption from silence were not offended. The statute was enacted to relieve a defendant in a criminal case,

[6] Section 3116 of the Internal Revenue Code is derived from the Act of August 27, 1935, § 8, 49 Stat. 872, 874, the "Liquor Law Repeal and Enforcement Act." The Senate Report on that Act stated, with respect to this provision, that "this extension bridges a gap now existing in the internal-revenue laws and in title III [now Chapter 26, Subchapter C, Part II, I, R. C.] with regard to the seizure of property intended for use in violating the designated laws." (S. Rep. 1330, 74th Cong., 1st sess., p. 3.)

at his election, from his common-law disability as a witness. *Bruno* v. *United States,* 308 U. S. 287, 292; *Wilson* v. *United States,* 149 U. S. 60, 65–66. Having thus made a defendant competent to testify, as a corollary it was appropriate, so as not to infringe upon the constitutional privilege against self-incrimination, to prohibit the creation of any presumption against him by reason of his desire to remain silent. See *Tomlinson* v. *United States,* 93 F. 2d 652, 656 (App. D. C.), certiorari denied, *sub nom. Pratt* v. *United States,* 303 U. S. 642. However, the statute in terms, and appropriately so, is limited in its application to the "trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors." It has no application in purely civil proceedings. See *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 153–154; *United States* v. *Lee Huen,* 118 Fed. 442, 456 (N. D. N. Y.). The instant proceeding was not a criminal proceeding within any of the categories set forth in the statute, nor was it a proceeding against petitioner as a person "charged with the commission of a crime." The proceeding was *in rem* against certain property forfeited because it was intended to be used in the commission of a crime and not in consequence of the actual commission of an offense. No actual commission of a crime was necessary to support the libel, nor so far as

this libel is concerned, was any offense by petitioner established.[7] Cf. *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237, 267, where a comparable statute was involved.

For similar reasons, it cannot be said that the trial judge's remarks violated the privilege of the Fifth Amendment against self-incrimination. The object of that provision is to secure a person against criminal prosecution which might be aided directly or indirectly by his disclosure. *Brown* v. *Walker,* 161 U. S. 591. Where the facts do not constitute a federal offense, or where prosecution is barred, as by the statute of limitations, amnesty, immunity or pardon, the privilege cannot be invoked. *Brown* v. *Walker, supra;*

[7] In his brief in support of his petition for rehearing below, petitioner asserted (p. 11), though he does not reiterate the point here, that possessing property intended to be used in violation of the internal revenue laws is itself criminally punishable under Section 3115 (b) of the Internal Revenue Code (26 U. S. C. 3115 (b)), which provides, in part, that:

"Any person violating the provisions of this part or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). * * *"

However, the foregoing provision relates only to violations of "this part" of the Internal Revenue Code, i. e., Chapter 26, Subchapter C, Part II, relating to industrial alcohol. The provisions of Section 3116 relate to possession of property intended for use in violating "this part" of the Internal Revenue Code or any of the other internal revenue laws. And it was to provisions of such laws other than Chapter 26, Subchapter C, Part II, and not concerning industrial alcohol, that the intended offenses were related by the terms of the libel. Obviously, therefore, Section 3115 (b) is inapplicable.

Robertson v. *Baldwin,* 165 U. S. 275, 282; *United States* v. *Murdock,* 284 U. S. 141, 149; *Moore* v. *Backus,* 78 F. 2d 571, 577 (C. C. A. 7), certiorari denied, 296 U. S. 640; *Graham* v. *United States,* 99 F. 2d 746, 749 (C. C. A. 9); *United States* v. *St. Pierre,* 128 F. 2d 979, 980–981 (C. C. A. 2). Thus, the Fifth Amendment is inapplicable here, since the forfeiture was not in consequence of the commission of any criminal offense, and petitioner was not, by reason only of his intent to violate the internal revenue laws, subject to criminal prosecution. The *Boyd* case, on which petitioner relies, is therefore clearly inapposite. That case was a forfeiture proceeding under a statute providing punishment by imprisonment or fine and by forfeiture in consequence of a completed offense. This Court said that since the forfeiture was provided by reason of an offense for which criminal prosecution could be had, the forfeiture proceedings were quasi-criminal and that, therefore, evidence secured by an illegal search and seizure could not be employed therein because such use would violate the privilege against self-incrimination (116 U. S. at 633–634). Here, however, in contradistinction to the *Boyd* case, the forfeiture is preventive and not in consequence of an offense for which petitioner could be prosecuted. Moreover, petitioner's failure to testify, or the district court's reference to that fact, is not incriminating evi-

dence which could be utilized affirmatively against him in a criminal proceeding.

CONCLUSION

The decision below is correct and there is no conflict of decisions as petitioner urges. For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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